IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 7 OF 2023

(Originating from Karatu District court Criminal case No. 196/2022)

JOSHUA STEVEN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

25/10/2023&30/11/2023

GWAE, J

The District Court of Karatu at Karatu (hereinafter trial court) tried and convicted the appellant, Joshua Steven of the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap 16, R. E, 2022. It was the allegation by the prosecution that, on the 17th day of October 2022 at Karatu Township-FAO area within Karatu District in Arusha Region, the appellant did have carnal knowledge against one "AE" (victim's name for the purpose of hiding the identity) a boy of 12 years against the order of the nature.

Upon entering conviction, the trial court sentenced the appellant to the term of life imprisonment on the basis that, the victim was of 12 years

old, under the age of majority. The statutory provision applied is section 154 (2) of the Penal Code, which reads;

> "(2*) where the offence under subsection (1) is committed* ***to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.***"
> Emphasis supplied)

Aggrieved by both conviction and sentence, the appellant has knocked the doors of this court advancing four grounds of appeal notably;

1. That, the trial court erred in law and fact for convicting the appellant while the prosecution totally failed to prove the case against him beyond reasonable doubts
2. That, the trial court erred in law and fact for failure to properly analyse evidence adduced and employing wrong reasoning; Thu, made a wrongs findings and decision
3. That, the District Court grossly erred in law and fact for failure to conduct voire dire examination before the victim (PW2) and PW3 testified as required by the law
4. That, the trial court erred in law and fact in admitting and relying on the PF3

Before this 1st appellate court, the appellant had no legal services; he thus fended himself whereas **Ms. Elice Mtenga,** the learned counsel appeared for the Republic. Nevertheless, the appeal was disposed by way

of written submission. I shall accordingly consider the parties' written submission while determining each issue.

For the reason, which shall be very obvious hereinafter, I shall start the third ground of appeal which reads; *that, the District Court grossly erred in law and fact for failure to conduct voire dire examination before the victim (PW2) and PW3 testified as required by the law.*

The learned state attorney stated that, the trial court massively violated the legal requirement under section 127 (2) of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019 (Act-TEA) when it proceeded recording testimonies of PW2 and PW3 (children of tender age) who were aged 12 and 14 years when they testified. It is further submission of the appellant that the trial court did not demonstrate how it arrived at the opinion that the said witnesses had ability to testify.

The appellant cemented his argument by referring to the case of **Jumannne Manoza vs. Republic,** Criminal Appeal No. 4040 of 2019 (unreported) where after a finding that, the voire dire was not properly conducted, the Court of Appeal of Tanzania stated that, the omission to conduct it is fatal whose consequential order is to disregard the evidence of such witness.

On the other hand, the prosecution has reacted by arguing that, there is no longer the requirement of the law to conduct voire dire examination in terms of section 127 (2) of the Tanzania Evidence Act. According to her, the appellant's argument is nothing except a total misdirection.

In order to be innocuous while determining the appellant's 3rd complaint, it is apposite to have section 127 (2) of the TEA reproduced herein under;

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

In my considered, view the above subsection (2) of section 127 of the Act envisages that a witness who is of tender age as per subsection (4) of section 127 of the Act. Therefore, subsection (2) of section 127 of the Act gives a leeway or alternative to the former principle of taking voire dire by permitting the child of that age to give his or her testimony in either of the two ways, these are;

One, the child of tender age who appears before the court of law may take oath or make an affirmation before giving evidence whereby the trial court must first be satisfied if that witness possesses sufficient

knowledge. This mode of taking evidence brings us back to the requirement of ascertaining ability to know the meaning of taking oath or making an affirmation. Thus, such witness should be tested by asking simplified and pertinent questions and if the court is satisfied that, he or she is capable of understanding the nature of taking oath or affirmation then his or her testimony shall be given under oath or affirmation

Two, the child of tender age may promise to the court to tell the truth and not to tell the lies before giving his or her testimony. Hence, this kind of testimony shall be taken after that child has promised to tell the trial court nothing but the truth and the trial court has to record to that effect.

In **Salehe Ramadhani Othman vs. Republic**, Criminal Appeal No. 532 of 2019 (unreported), when the Court of Appeal dealt with similar situation and held that;

> *"We have however noted that in addition to his promise of telling the truth and not lies, PW1 gave his evidence on affirmation, although the record does not reflect that he understood the nature of oath. We wish to emphasize that the amendment to section 127 (2) of the Evidence Act did not dispense with or do away with the duty of the trial court, before receiving the evidence of a child of a tender age, to ascertain whether the said child possesses*

sufficient intelligence and understand the duty to speak the truth. See the provisions of sub-section (1) to section 127 of the Evidence Act. However, since in this case, we are satisfied that the learned trial Magistrate complied with the requirement of section 127 (2) of the Evidence Act and PW1 promised to tell the truth and not lies, his evidence has evidential value and cannot be discounted from the record as submitted by the appellant. We are settled in our mind that the evidence of PW1 could stand-alone and capable of mounting a conviction on the appellant.

In our present matter, it is clear from the record that, the trial court did not ask PW2 and PW3 any simplified questions. However, it is recorded that, the said prosecution witnesses had ability to testify neither such witnesses promised to tell the truth and not to tell the lies as required by the law. Due to non-compliance with mandatory requirement of the law complained by the appellant, the evidence adduced by PW2 and PW3 is subject to being expunged as I hereby do.

Having expunged the evidence given by PW2 and PW3, I am now duty to ascertain if the remaining evidence for the prosecution is sufficient to sustain the conviction entered by the trial court. Having expunged the evidence adduced by PW2 and PW3 the only evidence remains is that of a medical practitioner (PW4), PF3 and the appellants cautioned (PE2). I

am certain that evidence of an expert requires corroboration. In the matter at hand, I am not persuaded if there is any evidence corroborating that of the expert. Generally, the evidence of an expert can be considered by the court along with other pieces of evidence since the opinions of experts ate not ordinarily conclusive. (See judicial precedent in **Makame Junedi Mwinyi vs. Serikali ya Mapinduzi Zanzibar (SMZ)** (2000) TLR 455.

Another piece of evidence is the appellant's cautioned statement, PE3, which he admitted its correctness. Going through the statement, I am not convinced if the same constitutes confession of the offence he stood charged with since he merely admitted to have been with the victim in the material night but patently denied to have committed the offence. The appellant further clearly admitted to put the victim under his restraint on the ground that the victim was indebted for the sum of Tshs. 1,000/=. That alone in my firm view, cannot justify the court to uphold the trial court's conviction since it leaves a lot to be desired such as the appellant's act spending night with the victim was necessary for him to commit the alleged offence or not. For lucidity, parts of the appellant's cautioned statement is reproduced herein under;

> "*Nilimtishia kwamba asiponilipa pesa yangu nitamvunja mguu kisha nitamfira yaani kumlawiti, kumuingizia uume*

wangu kwenye mkundu wake. Sikufanya kitendo hicho na aliniambia pesa yangu ataileta kesho yake yalikuwa ni mazingira ya nyumbani...na wakati huo ilikuwa ni usiku aliogopa kwenda nyumbani....."

Having determined the 3rd ground of appeal, I am therefore not bound to be curtailed determining the remaining grounds of appeal, suffices to hold that the remaining evidence is insufficient to safely sustain the appellant's conviction.

In the end result, the appellant's appeal is hereby allowed. He is to be unconfined from prison custody henceforth unless withheld therein for a different and lawful cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 30th November 2023

M. R. GWAE
JUDGE